

Opinions of Guangzhou Intermediate People's Court on Protecting the Legitimate Rights and Interests of Private Enterprises Practically, Legally and Equally to Shape a Sound Legal Environment for High-quality Development of Private Sector

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The *Opinions of Guangzhou Intermediate People's Court on Protecting the Legitimate Rights and Interests of Private Enterprises Practically, Legally and Equally to create a Sound Legal Environment for High-quality Development of Private Sector* is hereby formulated in light of the actual trial work of the courts in Guangzhou to play our judicial functions based upon the thorough implementation of the guiding principles of the Nineteenth National Party Congress and the guiding principles of the important address delivered by General Secretary Xi Jinping at the Private Enterprises Symposium, for purpose of the legal and equal protection over the legitimate rights and interests of private enterprises; the enhancement of the physical and property safety of private entrepreneurs and their business confidence; the establishment of a sound legal environment for high-quality development of private sector to serve and safeguard the overall social and economic development.

1. We shall fully recognize the significant role and position of private enterprises and foster the judicial concept of equal protection of the private sector in accordance with the law

1.1. Properly understanding the importance of protecting the private sector. As an important outcome of and also a primary driving force for the development of the socialist market economy, the private sector is playing a major role in the promotion of supply-side structural reforms, the boost of high-quality economic development and the construction of modern economic system. Both our municipal courts and basic courts shall attach great importance to the protection of private sector and shall thoroughly learn and implement the guiding principles of the important speech delivered by General Secretary Xi Jinping at the Private Enterprises Symposium to effectively bring our thoughts and actions in line with the guidelines. Policies on protecting the private sector shall be actively publicized to help a wider range of police officers to develop the thoughts centering on the legal and equal protection over the legitimate rights and interests of private enterprises, ensuring the implementation of the judicial policies aiming at protecting private enterprises.

1.2. Adhering to the basic principle of protecting private enterprises and private entrepreneurs on an equal and legal basis. During the trial and execution, the principle of equality in position of various market entities in litigation, equality in application of laws, equality in legal liabilities shall be upheld for the proper treatment of the relationship between the maintenance of state and collective interests and the equal protection of various market entities. The rights of private enterprises to operate legally and compete on an equal footing shall be protected and an all-round stable, equal, transparent and predictable legal environment shall

be developed for private enterprises in each stage. The physical and property safety of private entrepreneurs shall be guaranteed, allowing them to be relieved in operations, feel reassured in investment and focus on entrepreneurship, and maximizing the role of them in developing a modern economic system and promoting sustained, stable and sound economic development.

2. We shall play the role of criminal justice and strictly manage the standard for the determination of criminal offenses concerning private enterprises

2.1. Objectively looking at the problem of unregulated business operation in the history of private enterprises. Judicial concepts of “modest, prudent, civilized” shall be insisted on. Problems that have been caused by the unregulated business operation of various enterprises since the reform and opening-up shall be treated objectively from the perspective of history and development strictly under the principles of legally prescribed punishments for specified crimes, no punishment in doubtful cases, and following the former provisions and imposing lighter punishment, as well as provisions on limitation of prosecution, and shall be handled impartially according to the law. Those whose violation of laws and regulations do not constitute any crime or those very minor crimes with very limited harmful consequences shall not be punished. Those crimes against whom the limitation of prosecution has expired shall not be punished and those with inadequate evidence for crime shall be acquitted.

2.2. Accurately distinguishing between legitimate financing and illegal fundraising. The determination of the “illegality” of illegal fundraising activities shall be strictly dealt with in accordance with national laws and regulations on financing management, taking into account the rules and regulation developed by competent administrative authorities or relevant normative documents of the state. A private enterprise raising fund from various sources with very minor crime shall be acquitted if such fund are raised mainly for its ordinary business operations and may be repaid in a timely manner. The boundary between legitimate financing behavior and fund-raising fraud shall be properly understood. The financing activities of private enterprises may only be held as a crime of fraud in financing with proof to establish that such financing activities were carried out for illicit gain.

2.3. Properly determining the crime of illegal business operations. Private enterprises shall not be investigated for criminal liabilities in the name of the crime of illegal business operation if their business operations are not expressly prohibited by laws and judicial interpretations. For the determination of “violating state provisions” in the crime of illegal business operation, only the business operation violating the laws and decision made by the National People's Congress and its standing committee, or the administrative rules issued, administrative measures provided or decisions or orders issued by the State Council may be held as “violating state provisions”. Article 225(4) of the Criminal Law, a catch-all clause in respect of “other illegal business operation materially disrupting the market order”, shall be applied cautiously. Business operation for which no express provision is set forth in laws and judicial interpretations and for which a dispute arises for the determination as an illegal business operation or shall not be submitted to as a problem of law application the superior court for instructions.

2.4. Cautiously determining the bribery of private enterprises. The grant of "rebate" or other "benefits" by enterprises for ordinary business operation shall be distinguished between individual act and corporate act and its social damage shall be considered comprehensively in terms of cause, purpose, amount of bribery, times, date, targeted object, nature of interest, usage and otherwise. The offender shall be given a lenient punishment in accordance with the law to the extent of (i) a minor degree; (ii) an active cooperation with the investigation of competent authority; (iii) playing a key role in the detection of bribery cases; (iv) a forced bribery as a result of the government officials; or (v) a voluntary confession. The offender who has being extorted to give money or properties to government officials without obtaining illegitimate benefits shall not be determined as committing a bribery crime.

2.5. Accurately determining the crime of malicious embezzlement of state assets. The property right dispute arising during the engagement of a private enterprise in the restructuring of state-owned enterprises and the crime of malicious embezzlement of state assets shall be divided accurately to properly understand the application of such crime. Those who fail to meet the conditions precedent for crimes such as corruption, embezzlement of public funds or unauthorized partition of state assets shall not be determined as committing any offense according to law. A private enterprise which is involved in a civil dispute when engaged in the restructuring of state-owned enterprises in accordance with laws and administrative rules and regulations shall not be determined as committing any offense.

2.6. Strictly distinguishing contract disputes from contract fraud. The contract fraud shall be strictly distinguished from contract violation and dispute over obligation. The objective purpose of an actor shall be determined on the basis of following elements: the contract performance capability of the actor during the execution of the contract; the fraudulent conduct during the execution of the contract; the actual performance of the contract upon execution; the willingness to undertake default liability in case of a breach; the reason for non-performance. An actor without an intention to take others' property illegally shall not be determined as committing the crime of contract fraud. That's how to prevent the improper determination of a normal economic dispute arising during the contract performance as a crime.

2.7. Accurately distinguishing individual crime involving private enterprises from corporate crime. The responsibilities of private enterprises and their branches shall be differentiated accurately. A branch of a private enterprise which has an independent legal personality and does not constitute corporate crime shall not be investigated for criminal responsibility based upon corporate crime. A branch without an independent legal personality shall not be investigated for criminal responsibility based upon corporate crime if its illegal gains were controlled by its superior enterprise. In case a private enterprise commits the corporate crime, the corporate property shall be differentiated from the individual property of the entrepreneur and the fine imposed on the enterprise shall not be confused with that on the officers directly responsible for the enterprise and other person directly responsible.

2.8. Punishing all types of crimes that infringe upon the property rights of private enterprises. Crimes that undermine the fair market and business

environment by commercial bribery, financial fraud, false litigation or forced transactions and other illegal means shall be severely punished according to law. Crimes of infringement upon intellectual property and production and sales of fake and poor-quality commodities shall be severely punished according to law, focusing on striking chain link type and industrialized infringement upon intellectual property, repeated infringement with a repeated, malicious, network or organized nature and other infringement to a severe degree. Punishment on crimes severely infringing property rights shall be enhanced, including the severe infringement of private enterprises' property rights by public officers abusing their powers and illegal control imposed by public officers in certain economic sector in collusion with vicious power.

2.9. Handling appeals concerning private enterprises and private entrepreneurs in accordance with the law. The requirements in the *Implementation Opinions for Legally and Properly Handling Cases regarding Property Rights Historically Formed* issued by the Supreme People's Court shall be implemented, which means a record book shall be maintained for the trial of significant property right disputes and appeals of property rights disputes on disposal of material properties and appeals on crimes committed by private enterprises and investors shall be identified and discriminate according to law; corrections shall be made and compensation shall be provided to relevant parties for their loss in case of a misjudged case or unjust case resulted by confused fact, insufficient evidence or improper application of law. For cases not falling within the scope of correction according to relevant laws and policies, interpretation shall be made to relevant parties in respect of such laws and policies.

3. We shall properly resolve civil and commercial disputes to protect the legitimate rights and interests of private enterprises

3.1. Protecting lawful transactions. Civil and commercial contract disputes involving private enterprises, such as disputes on transaction, borrowings, construction and contracting of processing, shall be properly and timely heard according to law. The contractual liabilities of the parties shall be divided correctly to protect the legitimate rights and interests of private investors. The relationship between autonomy of the will and government approval shall be treated in a correct way. For contracts of which the effectiveness shall be subject to the completion of relevant approval or registration formalities as required by laws and administrative rules and regulations, the validity of them shall be determined in accordance with the *Interpretation I of the Supreme People's Court on Several Issues Concerning the Application of the Contract Law of the People's Republic of China*. The requirements on "violation of mandatory provisions of laws and administrative rules and regulations" set forth in Article 52(5) of the Contract Law shall be properly understood, identified and applied with attention paid to the separation of mandatory provisions on validity and mandatory provisions on management for the purpose of guaranteeing the strict limitation on the scope of invalidity. In case either party of a contract required terminating the contract, the contract shall be reviewed rigorously to determine whether it is qualified for termination to prevent the dishonest party from evading its obligations by means of contract termination.

3.2. Properly resolving property rights disputes. For property right disputes involving enterprises with affiliated business or those with share-holding

entrustment, the owners' equity shall be identified based upon the careful ascertainment of actual investment to prevent from embezzling the property of private enterprises. Disputes relating to enterprise reform shall be heard in accordance with relevant laws and regulations and policies to accurately identify the property relations and equally protect the legitimate rights and interests of private enterprises.

3.3. Protecting the legitimate rights and interests of shareholders of private enterprises according to law. Disputes on shareholders' right to know, right to demand distribution of profits, the request to determine the resolutions of the board of directors, shareholders' meeting or general meeting of shareholders as invalid or to remove such resolutions shall be determined according to law to protect investors' legitimate rights and interests as a shareholder. Through the trial of equity transfer disputes, the channels for equity transfer may be unblocked and the right of all types of investors to withdraw from a company may be protected according to law. In the trial of dispute involving the request from creditors for the repayment of debt by the company, the liabilities and properties of the company shall be identified correctly to prevent from repaying corporate debt with shareholders' individual properties or common properties of their families without a legal basis.

3.4. Properly handling financing disputes. Financial cases in which private enterprises are involved, such as cases concerning borrowings, financial lease, private lending, guarantees, notes, securities, futures and trusts shall be determined legally to give support for the valid financing of private enterprises from multiple sources so that the difficulties in financing and the expensive cost for financing may be mitigated. The legal force of new types of guarantee contracts shall be determined correctly to help private enterprises to improve their financing guarantee capacity. Legal protection shall be granted to private financing innovation to promote the orderly market-oriented movement of private capital. Judicial protection standards for interest rate of borrowing and lending shall be implemented rigidly and high interest rate other than those applied by commercial banks, pawn companies and micro-credit companies shall not be supported. If, during the trial of a case, the offender is suspected to commit in crimes such as money laundering, violent debt collection, malicious debt collection and "trap loan", relevant case materials shall be transferred to the public security in a timely manner to promote the development of a valid and order market for private lending.

3.5. Properly handling labor disputes. The idea to balance the legal protection of the legitimate rights and interests of workers and the survival and development of enterprises shall be insisted on to organically unify the protection of workers' rights and interests and the survival and development of enterprises. For private enterprises, especially medium-sized and small and micro enterprises with temporary financial difficulties and a great development potential, reconciliation and mediation shall be made to the greatest extent to encourage the workers to go through difficulties together with the enterprises; for those forced out of the market due to overcapacity, the priority shall be given to trials, property preservation and advance execution to protect the rights and interests of workers to the maximum extent; and in case of a change in industrial structure with a material regional or industrial impact, the labor dispute resolution plan shall be developed in advance to

promote the development of a multi-tiered and all-dimensional coordination and linkage mechanism for labor dispute resolution. Efforts shall be made to protect forms of legal employment adopted by private enterprises and the balance of the interests of workers and private enterprises for the purpose of reducing the labor cost of private enterprises and strengthening their industrial competitiveness.

3.6. Properly handling environmental resource disputes. The judicial idea to balance the ecological environment protection and the coordinated development of enterprise and people's livelihood shall be upheld. The application of criminal penalty shall be made cautiously while civil liabilities such as elimination of pollution and loss compensation shall be applied properly and the tasks and objectives to serve the ecological and environmental protection in the new era shall be accurately understood.

3.7. Improving the bankruptcy and restructuring mechanism of private enterprises. Business bankruptcy case shall be heard properly to shorten the trial period and the linkage of the check and control system with the trial of liquidation and bankruptcy shall be implemented to dispose of the property of private enterprises according to law. The supporting mechanism shall be improved to regulate the management and use of the amount included in budget and specially provided for trial of liquidation and bankruptcy cases and to give full play to the role of coordination mechanism between governments and courts under the leadership of the Party Committee. The special functions of the bankruptcy and reorganization procedure shall be developed to optimize the allocation of capital, technology, personnel and other factors of production and support private enterprises to resume and return to the market.

4. We shall adopt compulsory measures according to law to strengthen the enforcement work constantly.

4.1. Adopting seizure, attachment, lock-up and other compulsory measures according to law. The compulsory measures over the enterprise and people involved in a case shall be adopted cautiously according to law, taking into account the nature of the behavior and the extent of damage. If, during the trial and execution of a criminal case or a civil case, compulsory measures such as seizure, attachment and lock-up are required, then except for enterprises ordered to be closed according to law, the working capital and current accounts of enterprises may be retained if necessary and if permitted. The "flexible seizure" is allowed for movable property required for production and business operation. Property not related to the case may be seized, attached or locked up.

4.2. Strictly regulating the disposal of property involved in the case. A strict distinction shall be made between illegal gains and lawful properties, and no recovery or compensation may be ordered for gains which cannot be confirmed as illegal one upon the trial. The corporate property of enterprise shall be strictly distinguished from the individual property. No corporate property may be involved in the determination of a crime committed by a natural person such as shareholder or people managing the business operation and no legal individual property may be involved in the determination of a corporate crime without the application of statutory procedures. The individual property of the people involved in a case shall be strictly distinguished from the property of his/her family and no legal family property may be involved in the determination of a crime committed by such people.

The mechanism applicable for the custody, appraisal, valuation, auction and sale of property involved in a case and for expiating debts in kind shall be strictly implemented and constantly improved in accordance with the requirements of openness, fairness, standard and efficiency.

4.3. Timely and effectively preserving the legitimate rights and interests of the winning private enterprise. Economic entities under all forms of ownership shall be protected on an equal footing and the legitimate rights and interests of the parties who keep their word shall be protected fairly and efficiently. The enforcement mechanism shall be improved from time to time and various types of enforcement measures shall be adopted comprehensively to further enhance the proper enforcement of a case in which a private enterprise is involved and guarantee the timely realization of the rights and interest of the winning private enterprise. Special action on treatment of long-pending cases involving the Party and government organizations shall be taken to cause the Party and government organizations to implement judgments effectively.

4.4. Actively promoting the development of a credit system for private enterprises. The credit supervision, warning and punishment mechanism and the report, record and publication system applicable for dishonest persons subject to enforcement shall be improved to give a full play to the credit punishment function of the system of publicizing the list of dishonest persons subject to enforcement. The credit records and credit files of private enterprises and private entrepreneurs shall be improved based upon the credit reporting system to implement the system of joint incentive for keeping faith and joint punishment for losing faith. Dishonest persons subject to enforcement shall be restricted from going abroad, consuming, bidding and tendering, and engaging in government procurement according to law. Greater efforts shall be made to crack down on the circumventing, resisting, and intervening in enforcement of judgments and decisions.

5. We shall constantly improve the working mechanisms on trial and lifting up the level of judicial guarantee.

5.1. The trial efficiency shall be enhanced. The working mechanisms on trial shall be improved to intensify the supervision on time limit of trial and the extension, deduction and suspension of time limit shall be subject to more strict approval to enhance the rate of case closing within the trial period and practically resolve the "hidden" overdue trials. Special action on cleaning up long-term pending litigation and criminal cases of prolonged detention without resolution shall be taken constantly and the regular report and hierarchic oversight mechanism shall be further advanced. The mechanism of separating complicated cases from simple ones shall be further improved for the effective trial and closing of cases involving private enterprises to ensure the timely settlement of disputes involving private enterprises, the timely punishment on criminal offenses infringing the rights and interests of such enterprises and to practically prevent the impact on their business operation from the delay in trial.

5.2. Improving the diversified disputes resolution mechanism. Support shall be given to play the role of trade associations and chambers of commerce in mediation. The litigation-mediation coordination mechanism among the comprehensive management organizations, administrative organs, mediation organizations and notary offices shall be established and improved and the development of "one-stop"

dispute resolution platforms shall be reinforced to provide creative on-line disputes resolution method for purpose of the active promotion of the diversified disputes resolution services with a higher quality and more convenience provided to private enterprises and the improvement in the efficiency of disputes resolution mechanism.

5.3. Constantly lifting up the judicial services. The development of demonstration windows for litigation services shall be promoted. The development of demonstration windows shall be put in a more dominate place, which means the organization and leadership of the work shall be intensified to promote the progress steadily. The platforms such as 12368, Shenwutong, Lüshitong and platforms for on-line case filing, electronic service process and on-line case review shall be further improved to build a "one-stop" litigation service center for the convenient and efficient judicial services for private enterprises.

5.4. Improving the guarantee mechanism. Police officers of both basic courts and the intermediate court shall be guided to implement the requirements on protecting the legitimate rights and interests of private enterprises in the whole process of case filing, trial and execution in principle of strengthening the self-discipline of both the Party and the court and those who infringe upon the legitimate rights and interests of private enterprises by using the power of trial and execution shall be investigated and punished with zero tolerance. The recording, reporting and accountability mechanism for intervention in judicial activities and specific cases shall be implemented to prevent the illegal intervention in judicial activities, judicial disputes and case handling by cadres of Party and government or other internal staff.

6. We shall strengthen the communication and actively extend the judicial functions.

6.1. Improving the communication mechanism. The mechanism for the further communication with NPC members and CPPCC members in private enterprises shall be consolidated and expanded to keep a smooth communication channel and reinforce the communication with the association of industry and commerce and industry associations to collect comments and suggestions of private entrepreneurs regularly for a better understanding of their judicial needs.

6.2. Strengthening the work related to judicial recommendations. The legal risks and legal issues suffered by private enterprises in accelerating structural transformation and upgrading and "going global" in the new normal of economic development shall be researched in light of the actual trial work of the courts, based on which, judicial suggestions shall be given to the association of industry, commerce and industry associations and competent government authorities to facilitate private enterprises to constantly improve their production and operation management systems, raise the level of industry management, enhance their international competitiveness and influence and guarantee the healthy and rapid development of the private sector.

6.3. Improving the capability of private enterprises to operate in compliance with the law. Judicial big data shall be further explored and applied, and the achievement of smart court development shall be used in full to accurately understand and judge the trial of cases involving private enterprises. White papers, typical cases and other judicial information shall be disclosed publicly, allowing

private enterprises to conduct legal risk assessment and business risk precautions. Cooperation will be made in education and training to facilitate the legal and integrity management of private entrepreneurs and help them to understand the legal limits in a more accurate way and make entrepreneurship and innovation according to law.

6.4. Establishing an integrity management incentive mechanism for private enterprises. Acts of integrity and legal compliance, and doing business according to laws and regulations conscientiously which are found during the judicial work shall be further publicized to present the excellent characters of those outstanding entrepreneurs to build a good social image of integrity and trustworthiness, fostering a sound mechanism and social atmosphere for protecting property rights and the legitimate rights and interests of private enterprises in accordance with the law, and to significantly stimulate and promote entrepreneurship.